

2
No. 87-613

Supreme Court, U.S.

FILED

DEC 17 1987

JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1987

Honorable George Brody, Judge
United States Bankruptcy Court,

Petitioner,

v.

Helen Jean Guercio,

Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT**

THOMAS J. MACK

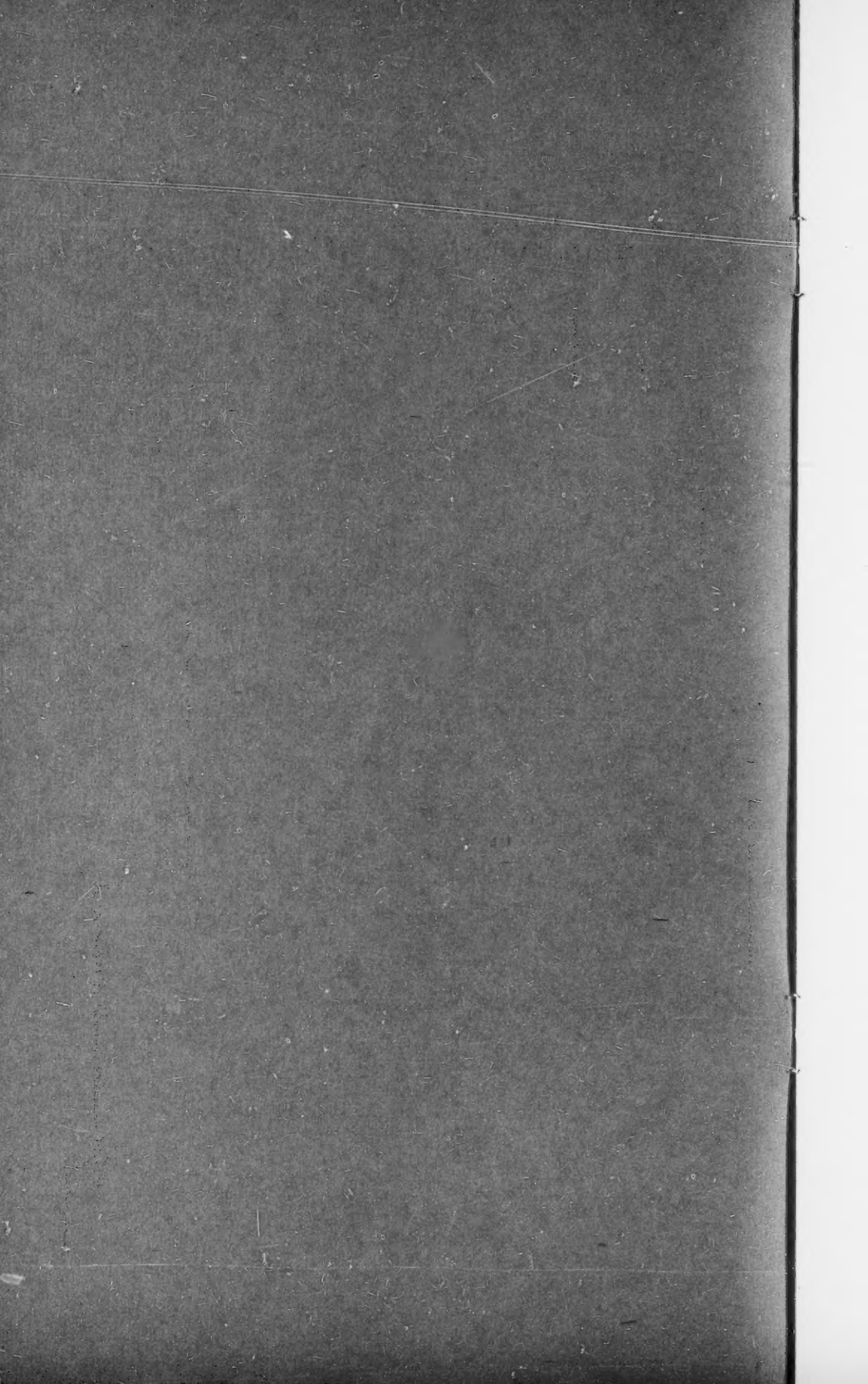
Counsel of Record

JONES, MACK, DELANEY & YOUNG
25 E Street, N.W.

Suite 710

Washington, DC 20001

Attorney for Respondent



QUESTIONS PRESENTED

Whether a judge is absolutely immune from damages when he fires his secretary.

Whether a judge is absolutely immune in his official capacity from declaratory and injunctive relief when he fires his secretary.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION	5

TABLE OF AUTHORITIES

	Page
<i>Forrester v. White</i> , 792 F.2d 647 (7th Cir. 1986), cert. granted, No. 86-761 (Feb. 23, 1987)	1, 2, 3
<i>McMillan v. Svetanoff</i> , 793 F.2d 149 (7th Cir. 1986), cert. denied, No. 86-384 (Dec. 1, 1986)	3
<i>Pulliam v. Allen</i> , 464 U.S. 473, 104 S.Ct. 190, 80 L.Ed. 2d 565 (1984)	4

No. 87-613

In The
Supreme Court of the United States
October Term, 1987

Honorable George Brody, Judge
United States Bankruptcy Court,
Petitioner,

v.

Helen Jean Guercio,
Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT**

ARGUMENT

The sole basis for review urged by the Solicitor General on behalf of Petitioner Judge Brody is that Judge Brody's case "... presents a question almost identical to that presented in *Forrester v. White*, cert. granted, No. 86-

761 (Feb. 23, 1987)” Petition for a Writ of Certiorari, at 5. The Solicitor General further asserts that the Court of Appeals for the Sixth Circuit acknowledges that its decision in Judge Brody’s case “. . . conflicts with the Seventh Circuit’s decision in *Forrester*.” *Id.* Neither assertion is accurate. This case does not present a question “almost identical” to that presented in *Forrester v. White*, 792 F.2d 642 (7th Cir. 1986). And the Court of Appeals of the Sixth Circuit did not in any manner acknowledge or assert that its decision was in conflict with *Forrester* (Petitioner’s App. A, at 7a).

The question in *Forrester* involved the discharge of a probation officer upon whom the judge in question had to rely “for advice on substantive decisions.” 792 F.2d at 654. The Court of Appeals regarded the judge’s reliance on the employee’s advice in making case determinations as crucial to its holding:

The fact that the functions performed by the plaintiff as a probation officer were inextricably tied to discretionary decisions that have consistently been considered judicial acts is the fundamental factor to consider in deciding whether the defendant was acting in a judicial capacity when he demoted and terminated the plaintiff.

792 F.2d at 657.

Judge Brody fired his secretary, not an employee who assisted and advised him in deciding cases pending before him. As the Seventh Circuit noted in *Forrester*:

- [A] janitor is not required to provide a judge with advice and information concerning pending cases. Thus, judicial immunity would not protect the judge who refuses to hire an individual to be a janitor.

792 F.2d at 656.

The *Forrester* opinion can only be properly read to conclude that the Seventh Circuit itself would not afford Judge Brody absolute immunity. His secretary did not assist Judge Brody in making discretionary decisions in a case or controversy. The Seventh Circuit drew the line for absolute immunity between employees whose duties include assisting a judge in resolving discretionary issues in pending cases and employees whose duties, like those of a janitor, may be essential to the judge's ability to function, but do not include advice or recommendation on pending cases.

The only case which presented to the Supreme Court a question "almost identical" to Judge Brody's firing of Ms. Guercio was *McMillan v. Svetanoff*, 793 F.2d 149 (7th Cir.), *cert. denied*, 107 S.Ct. 574 (1986). In *McMillan*, the Seventh Circuit refused to apply absolute immunity to the firing of a court reporter by a judge. The Sixth Circuit resolved Judge Brody's firing of his secretary in the same manner as the Seventh Circuit resolved the firing of the court reporter, and the Sixth Circuit relied upon the reasoning of the *McMillan* decision to do so (Petitioner's App. A, at 4a). This Court denied *certiorari* in *McMillan*. 107 S.Ct. 574.

Petitioner thus brings to this Court a case presenting a question almost identical to that presented in the Seventh Circuit's *McMillan* decision, which this Court refused to review, and entirely dissimilar from the question presented by the Seventh Circuit's *Forrester* decision, which this Court accepted for review.

Further, this case presents a question entirely absent from any presented in the *Forrester* decision. The Dis-

trict Court in this case dismissed not only the damages claims brought by Ms. Guercio against Judge Brody personally, but also her complaint for injunctive and declaratory relief against Judge Brody in his official capacity (Petitioner's App. B, at 14a). In doing so, the District Court relied solely upon the doctrine of absolute immunity (Petitioner's App. B, at 16a, 17a). The doctrine of absolute immunity has no applicability whatsoever to injunctive or declaratory relief. *Pulliam v. Allen*, 464 U.S. 473, 104 S.Ct. 190, 80 L.Ed. 2d 565 (1984). While the Court of Appeals did not expressly resolve the question presented by the District Court's application of absolute immunity to a complaint for declaratory and injunctive relief, it did so implicitly by refusing to permit the application of absolute immunity under any circumstance in Judge Brody's firing of Ms. Guercio. Ms. Guercio is therefore entitled to a remand regardless of the outcome in *Forrester*. To the degree this Court's resolution of *Forrester* might have any effect upon Ms. Guercio's case, such effect can be implemented in the District Court.

CONCLUSION

There is no reason to further delay the remand and reinstatement of Ms. Guercio's complaint, filed in January of 1985. Respondent Ms. Guercio respectfully requests the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

THOMAS J. MACK

Counsel of Record

JONES, MACK, DELANEY & YOUNG

25 E Street, N.W.

Suite 710

Washington, DC 20001

Attorney for Respondent